IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23320 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NIRMA CONSUMER CARE LTD. - Petitioner(s)
Versus
HARSIDDH SALES AGENCY & 2 - Respondent(s)

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Appearance :
MR MB GANDHI for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 07/02/2007

ORAL JUDGMENT

1. By filing this petition, the petitioner has

prayed to issue a writ of certiorari or any other appropriate writ, order or direction to quash and set aside order dated 25th August, 2005 passed below Exh.12 and 16 in Civil Suit No.3318/03 by City Civil Court, Ahmedabad granting un-condition leave to defend the suit to the respondent-defendant Nos. 1 and 3.

2. The petitioner-plaintiff filed a summary suit under Order 37 of C.P.C to recover a sum of Rs.30,06,085.42 ps. against the respondents alleging that the petitioner-plaintiff is carrying on its business of manufacturing washing powder, detergent cakes, toilet soaps, liquid blue and other things. The respondent-defendant No.1-partnership firm and Nos.2 and 3 being the partners of the firm had opened a current and mutual account with the petitioner-plaintiff and had purchased goods between 6.4.2001 to 8.12.2001. The orders of purchase of goods were placed at Ahmedabad and deliveries of the same were effected at Ahmedabad. The amount of bills were debited in the account and the amounts received from the respondents-defendants were credited in the

account maintained by the petitioner-plaintiff. The respondents-defendants purchased total goods worth Rs.3,34,29,392.50 ps. and made payment of Rs.2,94,92,072.12 ps between the period 3.4.2001 and 19.9.2001 by different drafts and receipts for the same were given to the respondents-defendants. Credit notes for the amount of Rs.4,96,675.80 ps. were also given to the respondents-defendants. After giving credit to the security deposit, Rs.26,49,176.72 ps. remained due and payable by the respondents-defendants. The respondents-defendants issued a cheque dated 4.4.2002 drawn on Karnataka Bank Ltd., Dharwad Branch for Rs. 12,69,929/-. However, the cheque was dishonored with endorsement of insufficient funds. Despite several demands the respondents-defendants did not pay the outstanding amount. Therefore, a notice dated 4.1.2003 was issued by the petitioner-plaintiff through its advocate. It was sent by registered post as well as under certificate of posting. However, the notice issued by registered post has returned back as it was not accepted by the respondents-defendants but the notice sent by certificate of posting has not been

returned. Despite that the respondents-defendants have failed to comply with the notice and to make payment and, therefore, the suit was filed to recover the outstanding amount. The respondents-defendants appeared through advocate on service of summons. Thereafter the petitioner-plaintiff took out summons for judgment Exh.12 against the respondents-defendants. In response to the summons for judgment the respondent-defendant Nos.1 and 3 filed affidavit for leave to defend Exh.16 raising various contentions. The respondents in their leave to defend affidavit contended that the suit is time barred, the accounts are not correct, there is no clarification as to the calculation of interest as per the oral agreement. It also contended that respondent-defendant No.2 was managing the affairs of respondent-defendant No.1 and respondent-defendant No.3 was supplying the goods as per the orders given by the parties and in the absence of respondent-defendant No.3, respondent-defendant No.2 took over the management of respondent-defendant no.1 and respondent-defendant No.2 was prevented from taking part in the management of respondent-defendant No.1

agency, therefore, the respondent No.2-defendant No.2 closed down the agency and started a new agency and has continued the business by taking goods from the plaintiff, that, the petitioner-plaintiff has not produced the record of transactions and details of accounts and, therefore, the respondent-defendant Nos.1 and 3 are entitled for un-conditional leave.

3. The petitioner-plaintiff filed a rejoinder-affidavit denying the contentions raised in the leave to defend affidavit.

4. After hearing learned advocate for the parties the learned trial Judge granted un-conditional leave to defend the suit to the respondents-defendants holding that there are tribal issues with regard to the claim of interest and accounts and therefore, this petition.

5. I have heard learned advocate Mr.M.B.Gandhi for the petitioner. Respondents are served but none has appeared.

6. It appears from the annexures produced along with the petition that the petitioner had produced voluminous documents in support of his claim before the trial court. The petitioner has, in the plaint clearly given details about the outstanding amount. It also appears that a cheque was issued by the respondents-defendants to the petitioner-plaintiff. However, the same has been returned on account of insufficient funds. The respondents-defendants have not explained this in their leave to defend affidavit. It also appears that a notice was issued by the petitioner-plaintiff claiming the outstanding amount. However, the respondents have refused to accept the notice. The respondents-defendants have raised defence of account for the first time in their leave to defend affidavit. It is not in dispute that there were series of transactions between the parties and the respondents-defendants have made payments against the bills. It is significant that the defendants have not disputed the transactions but have raised the defence of accounts but no accounts have been produced by them in support of their defence. In my view the order manifests non-

application of mind and material aspects like non-explanation of return of cheque, non-compliance of notice and raising the dispute about the interest and account for the first time in leave to defend affidavit have been ignored by the trial Court. Therefore the finding is perverse and not based on any material evidence. In my view no bonafide triable issue was raised. In the facts and circumstances it would be appropriate to allow the respondents-defendants to proceed by imposing condition to deposit amount to enable them to prove the defence. In my view, the learned trial Judge committed error by holding that there are tribal issues with regard to account. Therefore, the finding recorded by the trial court has resulted into grave injustice to the petitioner-plaintiff. Hence, the impugned order is required to be quashed and set aside. Accordingly the order dated 25.8.2005 passed below Exh.12 and 16 in S.C.S No. 3318/03 by City Civil Court, Ahmedabad is quashed and set aside. The respondents-defendants are granted conditional leave to defend the suit on respondents-defendants or any of them depositing Rs.12 lakhs before the trial court

within eight weeks from the date of this order. On deposit of aforesaid amount the respondents-defendants shall be entitled to file written statement within eight weeks thereafter. Petition stands disposed of. Rule is made absolute with no order as to costs.

(Bankim N.Mehta, J.)

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